

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 13-2006:

GLASGOW EDUCATION)	Case No. 1261-2006
ASSOCIATION, affiliated with the)	
MEA-MFT, NEA, AFT, AFL-CIO,)	
)	
Complainant,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
vs.)	AND RECOMMENDED ORDER
)	
GLASGOW BOARD OF TRUSTEES,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

On December 9, 2005, the complainant, Glasgow Education Association, affiliated with the MEA-MFT, NEA, AFT, AFL-CIO (the Association), filed an unfair labor charge asserting that the employer and respondent, Glasgow Board of Trustees, Glasgow School District #1A (the District), violated Mont. Code Ann. § 39-31-401 when it failed to notify the Association of a significant change in working conditions (a reduction of the high school teachers' preparation periods from two to one daily) and implemented that change without negotiation. The District interposed two defenses—waiver of the alleged unfair labor practice both (1) by the terms of the Collective Bargaining Agreement and (2) by the Association's failure timely to request bargaining. On February 16, 2006, the Board of Personnel Appeals ("BOPA"), acting through its investigator, completed its investigation, found probable merit, and referred the case to the Hearings Bureau.

Hearing Officer Terry Spear held the contested case hearing on May 16, 2006. Richard Larson, Harlen, Chronister, Parish & Larson, P.C., represented the Association, whose designated representative was Laurie Enebo. Tony C. Koenig, Montana School Boards Association, represented the District, whose designated representative was Margaret Markle.

The parties stipulated to admit Exhibit 1, the parties' Collective Bargaining Agreement for July 1, 2005 through June 30, 2006, into the record. Laurie Enebo, Brad Persinger, Margaret Markle and Clint Croy testified.

The District confirmed that it would restore two daily preparation periods to the high school teachers' schedule for the 2006-2007 school year. The parties then stipulated that the defense of waiver by failure timely to request bargaining was no longer at issue. The Association filed the last brief on July 3, 2006, after which the Hearing Officer deemed the matter submitted for proposed decision.

II. ISSUE

The issue is whether the Collective Bargaining Agreement waives notice and bargaining requirements for the District's reduction of high school teachers' daily preparation periods from two to one, with assignment of the teachers to study hall coverage during the other period.

III. FINDINGS OF FACT

1. The Glasgow Board of Trustees, Glasgow Public School District #1A ("the District") is a public employer as defined by Mont. Code Ann. § 39-31-103(10).

2. The Glasgow Education Association, affiliated with the MEA-MFT, NEA, AFT, AFL-CIO ("the Association"), is a labor organization as defined by Mont. Code Ann. § 39-31-103(6).

3. At all times relevant to this matter, the District and the Association were parties to a Collective Bargaining Agreement ("CBA") with a term extending from July 1, 2005 through June 30, 2006.

4. Pursuant to the CBA, the District recognized the Association as the exclusive collective bargaining representative for (among others) the high school teachers.

5. The CBA did not specifically require that the high school teachers be given any specific amount of preparation time.

6. During the terms of previous CBAs between the parties, the high school teachers had been given two preparation ("prep") periods.

7. During the terms of previous CBAs between the parties, the high school teachers were assigned to supervise study halls, without changing their two prep periods.

8. During the 2004-2005 school year, the schedule for the high school teachers included two prep periods and they were not assigned to supervise study halls. Aides supervised study halls.

9. The District had concerns about the effectiveness of aides' supervision of study halls. In March 2005, high school principal Margaret Markle announced at a staff meeting that high school teachers might be assigned study hall supervision during the upcoming school year.

10. The District did decide to assign teachers to supervise study halls for the 2005-2006 school year, because it concluded that the aides were unable to create an effective learning environment for all students. The District's schedule for high school teachers for the 2005-2006 school year included one prep period, and assigned high school teachers to supervise one study hall. No bargaining occurred regarding this change from the previous schedules.

11. The CBA generally reserved to the District the right to decide matters of inherent managerial prerogatives, including but not limited to transferring and assigning employees, maintaining the efficiency of government operations and determining the methods, means and personnel by which government operations would be conducted. The CBA also provided that all the teachers it covered would perform teaching and related services as dictated by the District.

12. The Association generally agreed, in the CBA, that all management rights, functions, and prerogatives not expressly delegated by the CBA were reserved to the District, to be executed by the District in conformity with the CBA's provisions.

13. The CBA contained a specific provision that elementary teachers would have at least 45 minutes of preparation and planning time, free of any direct responsibility over students.

14. The CBA did not contain any provision regarding preparation and planning time for high school teachers.

15. The CBA specifically provided that for District policy matters outside the scope of the CBA, District policy decisions were final.

16. The District committed to returning, for the 2006-2007 school year, to a schedule that provides two prep periods daily for the high school teachers.

IV. DISCUSSION¹

Montana law provides that each provision in every CBA is enforced “according to its terms.” Mont. Code § 39-31-306(3). This statute implicitly authorizes the Board of Personnel Appeals to interpret the provisions of CBAs to ascertain their terms.

In addition, the National Labor Relations Act (NLRA) is similar in many respects to the Montana Public Employees Collective Bargaining Act. As a result, federal decisions construing the NLRA can be instructive or persuasive in construing the Montana Act. *Brinkman v. State* (1986), 224 Mont. 238, 729 P.2d 1301; *Great Falls v. Young* (1984), 211 Mont. 13, 686 P.2d 185; *Small v. McRae* (1982), 200 Mont. 497, 651 P.2d 982; *State ex rel. B.P.A. v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117.

The National Labor Relations Board can interpret the terms of a CBA to decide an unfair labor practice charge. *NLRB v. C&C Plywood Corp.* (1967), 385 U.S. 421, 430; *see also The Developing Labor Law* (BNA, 4th Ed., 2001) Chap. 18, § I.B, p. 1375 (“the power of the Board to interpret collective agreements in the exercise of its unfair labor practice jurisdiction is wholly settled”), *citing Litton Financial Printing Division v. NLRB* (1991), 501 U.S. 190 (*noting* “[E]ven though the Court refused to enforce an order of the Board because it rejected the Board’s interpretation of the agreement in issue, the Court did not disturb the principles it had laid to rest in [*C&C Plywood Corp.*]”). Like the NLRB, acting under the NLRA, the Board of Personnel Appeals can interpret the terms of CBAs to resolve an unfair labor practice claim arising under the Montana Act.

The Montana Public Employees Collective Bargaining Act makes it an unfair labor practice for a public employer, such as the District, to refuse to bargain collectively in good faith with an exclusive representative, such as the Association. Mont. Code Ann. § 39-31-401(5). The duty to bargain collectively extends to meeting at reasonable times and negotiating in good faith with respect to “wages . . . and other conditions of employment or the negotiation of an agreement or any

¹Statements of fact in this discussion are hereby incorporated by reference to supplement the above findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

question arising thereunder.” Mont. Code Ann. § 39-31-305(2), incorporated into the duty to bargain collectively by Mont. Code Ann. § 39-31-305(1).

For an employer to make unilateral changes during the course of a collective bargaining relationship concerning mandatory subjects of bargaining is a violation of the requirement of good faith bargaining. *NLRB v. Katz* (1962), 369 U.S. 736. Absent waiver by the exclusive bargaining representative of the obligation, it continues during the term of the CBA. *NLRB v. Sands Manufacturing Co.* (1939), 306 U.S. 332, 342.

Prep time is the performance of duties involved in teaching, rather than break time. Reducing the amount of prep time during the work day for high school teachers does not reduce the amount of prep work necessary for teaching. By assigning the high school teachers to study hall supervision instead of a second prep period, the District effectively increased the amount of work it required from the high school teachers—the teachers still had the same amount of prep work to do, plus supervision of a study hall. On its face, requiring additional work is a condition of employment and a subject of bargaining. Mont. Code Ann. § 39-31-305(2).

In an appeal from a lower court’s denial of a union motion to compel arbitration of a school district’s unilateral decision to increase class and supervision assignments for teachers, decreasing their available prep periods from two to one, the Supreme Court of Minnesota reversed and required arbitration, commenting as follows, *M.F.T., Loc. 331 v. Ind. Sch. Dist. No. 361* (1981), 310 N.W.2d 482, 484:

The critical determination in the instant case is whether the increase in student contact time was a “term and condition of employment” or an “educational policy of the school district.” The master agreement defines “the terms and conditions of employment” as “the hours of employment, the compensation therefore [sic], and economic aspects relating to employment.” If the change is deemed to affect the “terms and conditions of employment,” then arbitration is warranted.

The agreement defines the teachers’ “basic day” as 8:10 a.m. to 3:50 p.m. Since the increase in student contact time cuts from two to one the number of periods available for class preparation, it appears that the new plan will lengthen the teachers’ “hours of employment.” In addition, there is merit in the appellant’s contention that the new policy

also affects the teachers' rate of "compensation" and thus the "economic aspects" of their positions.

The Supreme Court of Wisconsin found prep period changes to be subject to permissive, rather than mandatory, bargaining, but still subject to bargaining. *Dodgeland Ed. Assoc. v. W.E.R.C.* (2002), 639 N.W.2d 733.

The facts of this case support the determination that reduction of prep periods as a result of assignment of the high school teachers to study hall supervision was properly a subject of collective bargaining. Indeed, the District conceded that its statutorily reserved management prerogatives did not include reducing prep periods and assigning the high school teachers to supervise study halls. Instead, it asserted that the Association waived its right to bargain, by the terms of the CBA. The District argued that the parties had entered into a CBA that, interpreted according to its terms, included a provision empowering the District to make unilateral changes to prep periods as a matter of the exercise of management rights. Therefore, according to the District, the parties already had bargained and agreed that the District could change the prep periods for the high school teachers without further bargaining.

A written contract is interpreted according to its terms, if the terms are clear, explicit and do not result in an absurdity. Mont. Code Ann. § 28-3-401. *See, Morning Star Ent., Inc. v. R.H. Grover, Inc.* (1991), 247 Mont. 105, 805 P.2d 553, *followed in Nyquist v. Nyquist* (1992), 255 Mont. 149, 841 P.2d 515.

The CBA generally reserved to the District the management rights which, by statute, the Association had to recognize. **Compare** Finding 11, *supra* (summarizing the contents of Article 3.1 and 3.2 of the CBA) with Mont. Code Ann. § 39-31-303 (emphasis added):

Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to: (1) direct employees; (2) . . . assign . . . employees; (4) maintain the efficiency of government operations; (5) determine the means [and] methods . . . by which government operations are to be conducted; . . . [and] (7) establish the methods and processes by which work is performed.

In Article 3.1 of the CBA, the Association and the District agreed (emphasis added):

The Exclusive Representative recognizes that the School District is not required to and is not permitted to meet and negotiate on matters of inherent managerial prerogatives which include but are not limited to the following: directing employees; hiring, promoting, transferring, assigning and retaining employees; relieving employees from duties because of lack of work or funds or under conditions where continuation of such work would be inefficient and non-productive; maintaining the efficiency of government operations; determining the methods, means, job classifications, and personnel by which government operations are to be conducted; taking whatever actions may be necessary to carry out the missions of the School District in situations of emergency; and establishing the methods and processes by which work is performed.

Thus, the parties generally agreed that “management rights, functions, and prerogatives not expressly delegated” by the CBA were reserved to the District, to be executed by the District in conformity with the CBA’s provisions (Finding 12, *supra*). By the express language of the CBA, the “management rights, functions, prerogatives” reserved were specifically those stated in the first sentence of Section 3.1, those management prerogatives over which the District was neither required nor permitted to bargain—*i.e.*, statutory management rights.

The Association had to recognize those management prerogatives of the public employer, pursuant to Mont. Code Ann. § 39-31-303 and also pursuant to Art. X, Sec. 8, Mont. Con. 1972: “The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.”

As the District conceded, the reduction in prep periods for the high school teachers was not a matter within its statutory management rights. The management rights clause of the contract therefore did not address the reduction in prep periods.

The Association could only waive its right to require collective bargaining by clear and unmistakable language in the CBA. *Metropolitan Edison Co. v. NLRB* (1983), 460 U.S. 693. There is no such clear and unmistakable language in this CBA. The management rights provisions of the CBA are nothing more than a recognition by the parties of the District’s constitutionally and statutorily reserved management rights. The Association was required by the statute to acknowledge these rights, which did not include making unilateral decisions about conditions of employment, mandatory subject of collective bargaining pursuant to the provisions of Mont. Code Ann. § 39-31-305(2), such as reducing prep periods by adding study hall assignments.

The District argued, in its brief, that acknowledging management rights reserved by statute constituted a knowing and voluntary relinquishment of the Association's bargaining rights,² but doing what the law requires in agreeing to the management rights provisions cannot reasonably be construed as waiving a right otherwise reserved to the Association, the right to bargain over conditions of employment. The NLRB has consistently rejected management rights clauses couched in general terms without reference to any particular subject area as waivers of statutory bargaining rights. *Michigan Bell Telephone Co.* (1992), 306 NLRB 281. A general management rights clause with no reference to any particular subject area does not constitute such clear and unmistakable language, and does not suffice to establish such a relinquishment. *Id.* Despite the District's contrary assertion, the Association merely agreed, in the CBA, that there are certain management rights over which the District is not required to bargain and, indeed, is not permitted to bargain. The Association did not waive its right to bargain over employment conditions.

The District's main rationale is that "a determination by the District of the method by which study halls would be supervised, a determination of which District personnel and job classification would supervise study halls, a determination of the method by which teachers would prepare for classes, and the assignment and transfer of teachers from a preparation period to a study hall period argument"³ are all determinations that fall within the management rights clause (echoing the statutory management rights language). Every District decision involving any change to the conditions of the teachers' employment that was not expressly addressed in the CBA could be described in similar language. By this analysis, every District decision involving conditions of the teachers' employment not directly addressed in the CBA would be waived by a management rights clause that simply recited the statutory management rights language.

By law the Association had to agree to the clauses, to "recognize" the District's management rights. Mont. Code Ann. § 39-31-303. A mandatory recognition clause cannot empower the public employer to make unilateral changes to every condition of employment not specifically addressed in the CBA. Such a reading guts the statutory requirement that the parties bargain collectively over conditions of employment. Mont. Code Ann. § 39-31-305(2). The "management rights" statute, incorporated

² "The Exclusive Representative recognizes that the School District is not required to and is not permitted to meet and negotiate on matters of inherent managerial prerogatives..." [Sec. 3.1. of the CBA]. If this is not a knowing and voluntary relinquishment of bargaining rights, then such a thing does not exist." Defendant's Post-Hearing Brief, p. 5, lines 1-5.

³ Defendant's Post Hearing Brief, pp. 6-7.

into the CBA, would thus swallow the Montana Public Employees Collective Bargaining Act, and require employee representatives either to bargain for every conceivable condition of employment that could arise over the term of the CBA, or to “waive” them all through a general management rights clause that employee representatives would be required by law to accept.

The Board of Personnel Appeals has found NLRB decisions on this issue to be persuasive and instructive, applying the NLRB analysis and approach to management rights clauses couched in general terms in Montana public employee CBAs. *E.g.*, *Bonner E.A. v. Bonner S.D.*, Case No. 2253-2004 (2005). Since the Montana Public Employees Collective Bargaining Act does require exclusive bargaining representatives to recognize school district’s management rights, the Board is clearly correct in requiring more than general management rights clauses that reiterate the statutory management rights before interpreting a CBA’s management rights clause as a relinquishment of statutory bargaining rights.

As an alternative theory supporting its very broad reading of the management rights clauses, the District has cited federal case law that creates an alternative to the waiver analysis, instead asking whether the CBA can be read to prove that the parties had already bargained over the relevant issues and memorialized the terms of that bargain in their contract. In some particular cases, the NLRB developed this new analysis of CBAs, called a “covered by” inquiry rather than a “waiver” inquiry. *E.g.*, *NLRB vs. U.S. Postal Serv.* (DC Cir. 1993), 8 F.3d 832. The “covered by” inquiry is logically distinct from the “waiver” inquiry. If the express terms of the CBA create a management right to make unilateral changes in conditions of employment otherwise subject to bargaining, then the CBA does “cover” the issue, and the parties have already bargained to agreement about it.

The District urges a very broad reading of the “covered by” inquiry, which would apply general management rights clauses to every condition of employment not expressly set by the CBA. Thus, whenever a management rights clause is too general to constitute a waiver, the enlarged “covered by” inquiry would accomplish the same objective.⁴ The two doctrines together would ensure that management rights clauses

⁴ For pointed criticism of the “covered by” analysis, *see, e.g.*, *Olivetti Office U.S.A. v. NLRB.* (2nd Cir. 1991), 926 F.2d 181, *cert. den.*, (1991), 502 U.S. 856; *NLRB v. United Technologies Corp.* (2nd Cir. 1989), 884 F.2d 1569; Wagner, “No” Means “No” When a Party “Really” Says So: The NLRB’s Continued Adherence to the Clear and Unmistakable Waiver Doctrine in Unilateral Change Cases, 13 Lab. Law. 325, 328, n. 14; *AT&T C.&C. Workers of Am.* (11/8/97), 325 N.L.R.B. 150; *cf. also*, *Chicago Park Dist. v. ILRB* (Ill.App. 2004), 820 N.E.2d 61.

would virtually always trump the duty to bargain for every conceivable decision not expressly addressed by the CBA. Coupling the two doctrines and applying whichever best fits the specificity or generality of management rights clauses would, as a practical matter, negate much of Montana's collective bargaining law.

The District cited a number of other provisions in the CBA, but these provisions cannot fairly be construed to cover the unilateral action taken in this case. Article 3.2 acknowledges that the District assigns teaching and teaching related services, but does not eliminate the District's obligation to bargain over conditions of employment. Article 6.3 dealing with assignments and involuntary transfers likewise cannot be construed to include a decision to reduce prep time by study hall assignments, as opposed to changing teaching assignments, grade levels, subject areas or buildings. Finally, Article 21.1 states that the CBA "constitutes Board policy" during its term, and adds that concerns about Board policy outside the agreement can be brought to the Board, with the Board's decisions being final in areas not covered by the CBA. Thus, if the Association (or anyone else) had a concern about Board policy outside of the CBA, the Board would make a decision that would be final. This provision, for the reasons already stated, cannot be read to mean that the Association thereby knowingly and voluntarily waived all collective bargaining rights on conditions of employment not expressly addressed in the CBA.

For all of these reasons, the management rights clauses in the CBA did not cover the issue of high school teacher prep periods and did not effectuate a waiver of the Association's right to bargain over a change in those prep periods. The District certainly could, and can in the future, decide that high school teachers should supervise study halls and that as a result those teachers would only have one prep period per day. Under the terms of the 2005-2006 CBA, the District could not make and implement this decision without bargaining, to address whether the teachers would be entitled to some additional consideration as a result of the change in their employment conditions.

Mont. Code Ann. § 39-31-406(4) provides that when the Board finds that an employer has engaged in an unfair labor practice, the Board shall order the employer to cease and desist from the unfair labor practice, and to take such affirmative action as will effectuate the policies of the Collective Bargaining Act. Thus the appropriate remedy for the District's failure to bargain in good faith is an injunction against making unilateral changes in terms and conditions of employment, a return to the

status quo ante,⁵ an order to bargain should the District again seek to make such a change, and a posting requirement.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this case and controversy. Mont. Code Ann. § 39-31-207.

2. A public employer must bargain collectively in good faith on questions of wages, hours, fringe benefits, and other conditions of employment with an exclusive representative of its employees. Mont. Code Ann. §§ 39-31-305 and 39-31-401(5).

3. An employer making unilateral changes during the course of a collective bargaining relationship concerning wages, hours, fringe benefits, and other conditions of employment has thereby refused to bargain in good faith. *NLRB v. Katz* (1962), 369 U.S. 736.

4. Pursuant to Mont. Code Ann. § 39-31-401(5), reducing the high school teachers' prep periods from two to one daily and assigning those teachers to supervise a study hall is a change in conditions of employment and constitutes a mandatory subject of bargaining with the exclusive representative of those employees.

5. Neither Mont. Code Ann. § 39-31-303 nor the management rights clauses of the CBA between the parties gave the public employer the unilateral right to make this change without bargaining.

6. The Glasgow Board of Trustees, Glasgow School District #1A, violated Mont. Code Ann. § 39-31-401 when it implemented a significant change in working conditions (a reduction for the high school teachers' prep periods from two to one daily, with assignment of the teachers to supervise a study hall) without negotiation with the Glasgow Education Association.

7. As a result of the unfair labor practice committed by the public employer, the exclusive collective bargaining representative is entitled to a cease and desist order and an order to post and to publish the notice set forth in Appendix A.

⁵ Return to the *status quo ante* will occur in 2006-2007, and therefore need not be ordered.

VI. RECOMMENDED ORDER

As a result of the unfair labor practice it committed, the District is hereby: (1) Enjoined from and ordered to cease and desist from unilaterally altering terms and conditions of employment without bargaining with the Association, in particular to cease the practice of unilaterally and involuntarily reducing high school teachers' preparation periods from two to one daily and assigning them to supervise a study hall in lieu of having a second prep period; and (2) Ordered to post, within 30 days of this order, copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted, at the High School for 60 consecutive days while school is in session and ensure that the notices are not altered, defaced or covered by any other material.

DATED this 1st day of August, 2006.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
Terry Spear, Hearing Officer
Hearings Bureau
Department of Labor and Industry

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE STATE OF MONTANA
BOARD OF PERSONNEL APPEALS

The Montana Board of Personnel Appeals has found that Glasgow Board of Trustees, Glasgow School District #1A, violated the Montana Collective Bargaining for Public Employees Act and has ordered us to post and abide by this notice.

We will not fail to bargain in good faith with the Glasgow Education Association, affiliated with the MEA-MFT, NEA, AFT, AFL-CIO;

We will not unilaterally change the terms and conditions of employment of employees covered by the collective bargaining agreement with the Glasgow Education Association, affiliated with the MEA-MFT, NEA, AFT, AFL-CIO;

We will bargain with the Glasgow Education Association, affiliated with the MEA-MFT, NEA, AFT, AFL-CIO, about any future reduction in the high school teachers' preparation periods from two to one daily, and/or assignment of the teachers to supervise a study hall.

DATED this ____ day of _____, 2006.

GLASGOW BOARD OF TRUSTEES,
GLASGOW SCHOOL DISTRICT #1A

By:_____